[redacted] SUPREME COURT, U. S.

PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 126

ROBERT N. DeVORE, M.D. Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TERRELL L. GLENN
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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

ROBERT N. DeVORE, M.D. — Petitioner

v.

UNITED STATES OF AMERICA, — Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

The petitioner, Robert N. DeVore, M. D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 18, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of South Carolina.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 18, 1970. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. To raise the issue of entrapment does petitioner have a greater burden of proof than to show that a government agent approached him in his office and repeatedly offered him a 10,000 percent profit to sell depressant and stimulant drugs?

2. Where the defense of entrapment is submitted to the jury may the government meet its burden of proof that there was no unlawful entrapment by: (a) using hearsay testimony on the issue of predisposition, (b) refusing to reveal the origin and content of the hearsay at any stage of the trial and (c) presenting a witness who gave admittedly misleading testimony to the effect that the defendant was under investigation for selling depressant and stimulant drugs before the government made its initial visit to the defendant?

3. Is the Fourth Amendment violated by the introduction into evidence of a recording of a conversation between the petitioner and a disguised government agent which took place in the petitioner's office and was transmitted

by use of a kel-set to an overhearing government agent located out of sight and away from petitioner's office?

4. Is due process of law violated where a petitioner is denied all access to the probation report?

STATEMENT OF THE CASE

The petitioner, a practicing physician, was convicted by the jury on April 24, 1969, on four counts of having sold depressant and stimulant drugs to a government undercover agent in violation of 21 U.S.C. 331 (q) (2).

The petitioner's defense was that he was entrapped by the government's agent. The evidence reflected that:

1. The government initiated the activity by visiting petitioner at his rural office. (T. 113, 192)
2. The government solicited the petitioner to sell drugs, but he initially refused to sell. (T. 113, 114)
3. The government then offered him a 10,000 percent profit if he would sell. (T. 115, 232)
4. The petitioner denied that he agreed to sell drugs on the agent's first visit. (Appx. 19)
5. The petitioner by his version of the transaction later made the sales in an effort to trap the government agent. (T. 301, 302)

The trial judge admitted into evidence a tape recording of one of the final conversations between the petitioner and the government agent. The conversation took place in petitioner's office and was transmitted by a kel-set to the trunk of the government agent's automobile, where it was monitored and recorded by another government agent. Timely written motion was made to suppress the record-

ings as violative of the Fourth Amendment. (T. 138, 140, 151, 173)

The trial judge submitted the question of entrapment to the jury (T. 442) but allowed the government to use hearsay testimony to meet its burden of proof on the issue of predisposition over petitioner's objection (T. 101, 102) and refused throughout the trial to make the government reveal the source or contents of the hearsay (T. Arraignment 5-8; Motions T. 104, 105) so that the petitioner could show that it was unfounded. The government was also allowed to present a witness who gave admittedly misleading testimony to the effect that the petitioner had been under investigation for selling drugs before the government made its initial visit to him. (T. 234, 235, 237, 239, 240)

The Court below avoided these questions by holding that "On this state of the record the government should never have been burdened with disproving entrapment." (Appx. 19) Alternatively the Court held that the question of entrapment was one for the jury but indicated no disposition of the above questions.

The Court below also approved the refusal of the trial judge to reveal any part of the probation report to defense counsel. After reading the probation report, the trial judge sentenced petitioner to four years imprisonment and the maximum possible fine of $22,000. The trial judge disclaimed reliance on the probation report even though he stated he had read it before sentencing.

REASONS FOR GRANTING THE WRIT

Question I

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Court of Appeals for the Fourth Circuit has here held that a defendant must show that the government "induced" him to commit a crime before the issue of entrapment becomes a jury question. The Court holds that a showing of "solicitation alone" by the defendant is insufficient to present a jury question as to entrapment. From the Court's opinion, it is clear that the burden placed upon a defendant to show "inducement" involves significantly more than a showing of "solicitation."

The Court in *Ryles v. United States*, 336 U.S. 949 (1949), reversed the conviction below for the court's failure to submit the question of entrapment to the jury even though a request for the instruction was not made. The opinions in *Ryles v. United States*, 183 F.2d 944 (10 Cir. 1950) and *Ryles v. United States*, 172 F.2d 72 (10 Cir. 1948), show that the record revealed only solicitation by an agent of the government as a basis for presenting the issue of entrapment. The Court of Appeals for the Tenth Circuit followed this holding in *Lunsford v. United States*, 200 F.2d 237 (10 Cir. 1952), where it approved an instruction that if the government originated the idea of the crime it would be unlawful entrapment but that if the defendant proposed the crime without suggestion from the government that the entrapment would be lawful.

The conflict between what the Fourth Circuit has here held and *United States v. Klosterman*, 248 F.2d 191 (3 Cir. 1957), is more striking. In *Klosterman*, the Third Circuit found entrapment as a matter of law where the evidence was that the defendant was solicited by agents of the government to commit a crime and the government was unable to show predisposition on the defendant's part. The Third Circuit rejected evidence of ready compliance as proof of predisposition stating at page 196: "We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man." See also, *United States v. Sawyer*, 210 F.2d 169 (3 Cir. 1954).

Thus to the Third Circuit a showing of solicitation by the government is sufficient to have the Court enter judgment of acquital in the absence of reply testimony while in the Fourth Circuit a showing of solicitation is not even sufficient to have the issue of entrapment submitted to the jury.

The First Circuit in *Whiting v. United States*, 321 F.2d 72 (1 Cir. 1963), held squarely that where the government solicited a defendant to sell drugs that the issue of entrapment was raised and that there was " . . . no initial burden upon the defendant." In addition to the apparent conflict with what the Fourth Circuit has here held, the matter has been further beclouded by the First Circuit's later case of *Kadis v. United States*, 373 F.2d 370 (1 Cir. 1967), where in extensive dicta the Court appears to retreat from its *Whiting* decision and place some burden upon a defendant in addition to showing that the government initiated the criminal activity through solicitation. The First Circuit cites *United States v. Riley*, 363 F.2d 955 (2 Cir. 1966), which does support its reasoning. The Fourth Circuit relied heavily on the *Kadis* opinion from which Judge Winter, concurring in the Fourth Circuit's opinion, expressly disassociated himself.

The fact remains that the holding of the First Circuit in *Whiting* cannot be reconciled with what the Fourth Circuit has here held.

In *Rogers v. United States*, 367 F.2d 998 (8 Cir. 1966), the facts were highly similar to the government's version of the facts passed upon by the Fourth Circuit in deciding this case. In *Rogers*, government agents solicited the defendant to sell wild game. The defendant apparently readily agreed to sell, but did not do so when first contacted and negotiated about price. The Eighth Circuit at page 1002, stated, 'We further hold that under the evidence in this case the question of whether or not the appellant had been unlawfully entrapped was clearly one of fact for the jury."

Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962), is contrary in principle if not holding to the position that the Fourth Circuit has taken. The D.C. Circuit explicitly acknowledged that where solicitation is shown the issue of entrapment is a jury question and the government has the burden of disproving entrapment.

2. THE DECISION BELOW RESOLVES SIGNIFICANT AND RECURRING PROBLEMS THAT HAVE SHARPLY DIVIDED THE FEDERAL COURTS.

> "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. See *Sorrells v. United States*, 287 U.S. 435; *Sherman v. United States*, 356 U.S. 369; *Masciale v. United States*, 356 U.S. 386. Whether in the absence of a conclusive showing the defense for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted.
>
> * * *
>
> The conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by Government agents which may well have induced the accused to commit the crime charged.
>
> In the case before us, we think that such a showing has not been made. It is undisputed that at the meet-

ing of October 21, petitioner made an unsolicited offer of $420 to Agent Davis. ***" *Lopez v. United States*, 373 U.S. 427 (1963).

The decisions cited in the first reason for granting the writ concern only one aspect of the growing conflict that increasingly fragments the concept of entrapment among the Courts of Appeals leaving the District Courts almost adrift. Entrapment is usually submitted to the jury in situations where the government has solicited a defendant to sell contraband goods. It might be suggested that the Courts have little hesitancy in allowing a jury to resolve the issue of entrapment where the defendant's possession of contraband and the usual testimony of his ready compliance make it unlikely that the defense will be successful.

In the unusual case such as the Fourth Circuit has here decided the defense of entrapment becomes a meaningful issue that calls into question the propriety of government agents offering a reward for the commission of a crime to a person that they cannot show is other than a substantial citizen who had no predisposition to engage in criminal conduct and who is legally in possession of the goods sought to be purchased. This presents the apparently frightening possibility that a jury may follow the Court's instruction and find the defendant not guilty. It also presents the frightening fact that if juries are not allowed to determine the issue of entrapment on such facts the government is free to make a general solicitation of its citizens offering substantial incentive for the commission of crime without fear of ever having its conduct challenged. This Court has not previously indicated a willingness to delegate to the police the power to decide the propriety of their own conduct. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Question II

3. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO HOW THE GOVERNMENT MAY MEET ITS BURDEN OF DISPROVING ENTRAPMENT.

The Fourth Circuit has here in effect held that the government may use hearsay testimony to show predisposition and not reveal either the source or the content of the hearsay information that it tells the jury that it had. The government's proof was buttressed by a witness who admittedly incorrectly testified that the petitioner was under investigation before the government solicited him to sell drugs. The Fourth Circuit gives this as an alternative holding by stating:

> "Finally, even assuming the issue of entrapment was properly raised by Dr. DeVore's evidence, the issue was one for the jury. See *Sorrells v. United States*, 287 U.S. 435 (1932). The conflicts between the agent's testimony and the testimony of Dr. DeVore presented an issue of fact. * * *" (Appx. 20)

This Court in *Marshall v. United States*, 360 U.S. 310 (1959), expressed disapproval of hearsay-reputation type testimony where entrapment was the defense. Five of the circuits have expressly held that hearsay cannot be used to show predisposition where entrapment is the defense. Those circuits are:

First Circuit:

Whiting v. United States, 296 F.2d 512 (1 Cir. 1961)
Walker v. United States, 344 F.2d 795 (1 Cir. 1965)
Kadis v. United States, 373 F.2d 370 (1 Cir. 1967)

Third Circuit:

United States v. Klosterman, 248 F.2d 191 (3 Cir. 1957)

United States v. Catanzaro, 407 F.2d 998 (3 Cir. 1969)

Ninth Circuit:

United States v. Walton, 411 F.2d 283 (9 Cir. 1969)

Tenth Circuit:

United States v. Brown, 411 F.2d 1134 (10 Cir. 1969)

District of Columbia Circuit:

Hansford v. United States, 303 F.2d 219 (D. C. Cir. 1962)

The Fourth Circuit by its alternative holding has here joined the Fifth Circuit in permitting the use of hearsay testimony to show predisposition. The Fifth Circuit has followed this course over a long period of time. *Rocha v. United States*, 401 F.2d 529 (5th Cir. 1968). The Fifth Circuit seems to permit the use of hearsay in reliance on older cases which held that probable cause to commence the investigation was a separate issue where the defense of entrapment was raised and that hearsay was admissible to show probable cause. It is now generally held that probable cause to commence the investigation is not an issue under entrapment. The Fourth Circuit has always held this view, *Newman v. United States*, 299 F. 128 (4 Cir. 1924). This compounds the confusion underlying the Fourth Circuit's reasoning.

The full import of what the Fourth Circuit has here held is highlighted by its allowing the government to withhold the information it had before it solicited the petitioner to sell drugs. The petitioner was denied a preliminary hearing, the agents refused to be interviewed about the matter, depositions in a companion civil case were denied, the trial judge would not order the reports produced pursuant to 18 U.S.C. § 3500 after the agent testified, nor would the trial judge order them produced pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), after the trial. After such an elaborate effort to conceal

the source of its information, the government then used it as unidentified hearsay to show predisposition.

Finally, the government produced a representative of a drug manufacturer who testified on cross examination that petitioner had been under investigation for illegal drug sales before the government approached him in this case. This testimony was mistaken, the government was aware of its inaccuracy but did nothing to correct it. No court has condoned misrepresentation of this type. *Hamric v. Bailey*, 386 F.2d 390 (4 Cir. 1967). *Miller v. Pate*, 386 U.S. 1 (1967). *Giles v. Maryland*, 386 U.S. 66 (1967). *Barbee v. Warden*, 331 F.2d 842 (4 Cir. 1964).

The Fourth Circuit has now in practical effect placed a heavy burden on a defendant to show that he was entrapped and then added a penalty for success. If entrapment becomes an issue it is properly resolved against the defendant through the use of hearsay and misleading testimony. If this decision is allowed to stand it is unlikely that any informed defense attorney will again raise the defense of entrapment in the Fourth Circuit.

Question III

4. THERE IS NOW PENDING BEFORE THIS COURT A DECISION OF THE SEVENTH CIRCUIT WITH WHICH THE FOURTH CIRCUIT IS IN ACKNOWLEDGED CONFLICT.

The Fourth Circuit has held a recording between the government undercover agent and petitioner admissible where the recording was made by another agent in the trunk of an automobile from a transmitter concealed in petitioner's office. The recording was obtained without a warrant and admitted over timely objection.

The Fourth Circuit stated, regarding its holding on this point:

"We recognize that the above discussion conflicts with the decision in *United States v. White*, 405 F.2d 838 (7 Cir. 1969) cert. granted 394 U.S. 957 (1969)" (Appx. 23)

If this Court affirms *White*, it would follow in logic that the decision of the Fourth Circuit should be reversed. In any event, the decision of the Fourth Circuit should be kept pending by the grant of certiorari until *White* is decided.

Question IV

5. THERE IS NOW PENDING BEFORE THIS COURT A DECISION OF THE SUPREME COURT OF FLORIDA THAT MAY BE DISPOSITIVE OF ONE FEATURE OF THIS CASE.

Waller v. Florida, 213 So. 2d 623 (Fla. 1969), certiorari granted 395 U.S. 975 (1969) presents the question of whether due process required disclosure of the contents of a probation report. The Fourth Circuit did not reach this question by accepting the trial judge's disclaimer that he did not rely on the probation report even though he read it.

If this Court should resolve the *Waller* question by holding that due process requires any degree of disclosure it should consider whether that degree of disclosure can be avoided by the declaration that the probation report was not relied upon. This consideration should be given especially in view of Rule 32 of the Federal Rules of Criminal Procedure which requires that the Court have a probation report.

CONCLUSION

For these five reasons, a writ of certiorari should issue

to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,
Terrell L. Glenn
511 Barringer Building
Columbia, South Carolina

April, 1970

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,580

UNITED STATES OF AMERICA, *Appellee,*

versus

ROBERT N. DeVORE, M.D. *Appellant*

Appeal from the United States District Court for the District of South Carolina at Aiken. J. Robert Martin, Jr., District Judge.

Argued December 3, 1969 Decided March 18, 1970

Before WINTER and CRAVEN, Circuit Judges and HARVEY, District Judge

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Charles Porter and Terrell L. Glenn (Glenn and Porter; Garvin and Grant; and Blatt, Fales and Peeples on brief) for Appellant, and Thomas P. Simpson, Assistant United States Attorney, (Joseph O. Rogers, Jr., United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

Dr. Robert N. DeVore was charged in a nine-count indictment involving unlawful sale of drugs in violation of 21 U.S.C. §§ 331(q)(2), 331(q)(4) (Supp. IV 1965-1968) and 21 U.S.C. § 331(p) (1964). After five counts were dismissed DeVore was tried and convicted on the remaining four counts, sentenced to a term of four years in prison, and fined $22,000. On appeal he assigns six points of error in support of his contention that we should direct acquittal or, at the very least, order a new trial. We believe none are meritorious and affirm

I

Dr. DeVore's first three points of error relate to the defense of entrapment.[1] The defense of entrapment rests on the premise that the purpose of law enforcement is the prevention, not the manufacture, of crime. See *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). In fulfilling this purpose the police may utilize stealth and deception, so long as these strategies do not "induce" an otherwise innocent person to commit a crime. *Sherman v. United States, supra*, at 372. The government may provide the opportunities or facilities for the commission of an offense by one otherwise predisposed to criminal activity, *Sherman v. United States, supra*, at 372; *United States v. Cantazaro*, 407 F. 2d 998 (3rd Cir. 1969); *United States v. Soles*, 401 F.2d 521 (6th Cir. 1968), *cert. denied*, 394 U.S. 931 (1969); *United States v. Smalls*, 363 F.2d 417 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967), but may not implant a criminal disposition into the mind of an innocent person, *Sorrells v. United States*, 287 U.S. 435 (1932); *Eisenhardt v. United States*, 406 F.2d 449 (5th Cir. 1969); *McDowell v. United States*, 383 F.2d 599 (8th Cir. 1967); *Goss v. United States*, 376 F.2d 812 (5th Cir. 1967); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966); *United States v. Irwin*, 354 F.2d 192 (2nd Cir. 1965),

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[1] As framed by the defendant, his first three points of error complain that (a) he was denied due process when "predisposition" information was withheld from him, (b) the court erroneously allowed the government to use hearsay testimony to satisfy its burden of proof on predisposition and erroneously instructed the jury on the effect of the hearsay testimony, and (c) the government allowed a witness to create the false impression that Dr. DeVore had been under previous investigation for illicit drug activity. Each of these arguments is related to the government's "burden" to show its reasonable cause to believe in DeVore's criminal predisposition in order to justify soliciting him. We treat the points together because of our conclusion that the government has no such burden and, therefore, that DeVore's first three assignments of error are based upon a false premise.

cert. denied, 383 U.S. 967 (1966); *United States v. Gaines*, 353 F.2d 276 (6th Cir. 1965). Thus, two elements, the quality of the police conduct and the defendant's state of mind, are relevant in deciding whether there has been entrapment. The interaction of the two has caused some difficulty in formulating the burden of proof and has led to some suggestion that the government may not offer the opportunity to commit crime without first showing that there are reasonable grounds to believe that defendant is predisposed to commit the offense. See *Lunsford v. United States*, 200 F.2d 237 (10th Cir, 1952); *Ryles v. United States*, 183 F.2d 944 (10th Cir. 1950), *judgment* vacated, 336 U.S. 949 (1949); *Heath v. United States*, 169 F.2d 1007 (10th Cir. 1948). We beleieve, with the First Circuit, that this goes too far. See *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967). Indeed, in this circuit it has been settled since *Newman v. United States*, 299 F 128 (4th Cir. 1924), that the government need not have reasonable grounds to suspect illegal conduct before offering the opportunity to commit a crime.

In *Kadis* the First Circuit correctly formulated the rule: if the defendant, through government witnesses or otherwise, shows some indication that he was corrupted by government agents, the burden of disproving entrapment will be on the prosecution. A showing of solicitation alone, however, will not suffice to place the burden of going forward with evidence on the government, since solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime. See, *e. g.*, *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *United States v. Berry*, 362 F.2d 756 (2nd Cir. 1966); cf *Lopez v. United States*, 373 U.S. 427, 437 (1963). The defendant, therefore, must also produce some evidence of unreadiness on his part, or of persuasion by the agent. *Kadis* is novel only in expressing the rule in terms of burden of proof.

It was previously well established that a defendant must show *prima facie* overreaching, inducive conduct on the part of the government before the issue of entrapment would be submitted to the jury. See, *e. g.*, *Lopez v. United States*, 373 U.S. 427 (1963); *Masciale v. United States*, 356 U.S. 386 (1958); *Wiley v. United States*, 277 F.2d 820 (4th Cir. 1960).

When the rules just discussed are applied to the facts of this case, it becomees apparent that DeVore failed to make an adequate showing of inducement. A government agent testified that he received information about Dr. DeVore's activities on two occasions in the latter part of 1967 and that he assigned another agent to investigate the reports. The investigating agent testified that he went to Dr. DeVore's office and posed as a truck driver seeking pills to keep him awake on a long trip. According to the agent the doctor agreed to give him a few pills, but at first refused to supply pills in large quantities for fear that the government would check his records. The agent told him that he was able to handle great quantities of pills for $100.00 per thousand, and Dr. DeVore ultimately agreed to obtain 10,000 Dexedrine pills for $1,000.00. On a subsequent visit to the office the agent arranged for a future sale of 500-1,000 pills, referred to as 'red birds." When the agent returned to pick up the 10,000 Dexedrine pills, he paid the doctor $850.00 and arranged to pay the balance a few days later. On a later visit he paid the $150.00 and purchased another bottle of pills, Nembutal, for $100.00. He also placed an order for 14,000 additional pills—10,000 Dexedrine, 2,000 Dexamyl, and 2,000 Nembutal. Over two weeks later he returned for the order of 14,000 pills and negotiated for additional shipments of drugs in larger quantities, but at a reduced price. He did not take the order of pills at that time,e arranging instead to pick them up a few days later. He did return for the pills and paid the doctor $1,050.00 for the shipment, which

he later found to be 2,000 pills short. On his final visit he recorded his conversation with the doctor by means of an electronic transmitter, which he carried on his person. On that occasion he purchased 10,000 Dexedrine pills and arrested Dr. DeVore. Portions of the tape recording were admitted into evidence in corroboration of the agents' testimony.

Dr. DeVore's version of what transpired differed from the agent's in two respects. First, he asserts that on the first contact he told the agent that he could not provide him with any pills. The main difference between his testimony and the agent's, however, was the reason the doctor gave for engaging in the contacts with the agent in the first place. He claims that he dealt with the agent only in order to trap him for the police. Dr. DeVore admittedly never informed the authorities of this plan, but he contends that he was, nevertheless, susceptible to plans of cooperation with the police, since he had once posed as a buyer of stolen goods to help state authorities catch a typewriter thief.

On this state of the record the government should never have been burdened with disproving entrapment. Dr. DeVore did not testify to any excessive behavior on the part of the government that could be said to be so inducive to a reasonably firm person as likely to displace *mens rea.* Under the principles we have discussed, therefore, no "inducement" to commit the crime was ever shown. There was only solicitation—the providing of opportunity. With no more than this, Dr. DeVore was not entitled to a jury instruction on the issue. See *Lopez v. United States*, 373 U.S. 427 (1963); *United States v. Berry*, 362 F.2d 756 2d Cir. 1966); see also *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969), *cert. denied*, ... U.S. ..... (1969).

Nevertheless, under the district court's charge, Dr. DeVore was given the benefit of an instruction on entrap-

ment and more. The judge twice gave the jury an example of lawful entrapment in which the government had reasonable grounds to believe that a suspect was engaged in illegal activity before its agents initiated a solicitation. The court probably did not intend the example as an instruction that reasonable grounds to believe in predisposition are a necessary element of lawful entrapment. However, by including reasonable grounds as a part of its illustration, the court gave DeVore more than he deserved under the rule in this circuit. See *Newman v. United States*, 299 F. 128 (4th Cir. 1924).

Finally, even assuming the issue of entrapment was properly raised by Dr. DeVore's evidence, the issue was one for the jury. See *Sorrells v. United States*, 287 U.S. 435 (1932). The conflicts between the agent's testimony and the testimony of Dr. DeVore presented an issue of fact. In light of Dr. DeVore's failure to notify the police of the trap he was purportedly setting, the jury was justified in discrediting his version of the events.

II.

In his fourth point of error DeVore complains that the district court erroneously excluded certain testimony by Dr. DeVore's wife. The testimony concerned a statement made by the doctor to his wife on an occasion when he had taken her to observe some damage to the back door of his office. It appeared the door had been damaged by someone attempting to break in. The doctor told his wife that he thought he knew who had attempted to break in and why—to obtain drugs. He stated to her that he was going to set a trap for the person.

We disagree with DeVore's assertion that the testimony was excluded by the court solely because it was "self-serving," whatever that means. The record conclusively shows that the court excluded it on the grounds that Dr.

DeVore had said nothing about the incident in his own testimony. Thus, the court viewed the statement as inadmissible in corroboration, since no foundation had previously been laid for it. The court did admit other testimony of Dr. DeVore's wife, as well as that of two other witnesses, to an identical statement by the doctor on a subsequent occasion.

The excluded testimony was intended by the defense as "rehabilitative" evidence. DeVore contradicted the testimony of the government agents and testified to a special motive for his actions. Corroborative evidence is clearly permissible under such circumstances. See *United States v. Leggett*, 312 F.2d 566 (4th Cir. 1962). Nevertheless, the extent to which prior consistent statements should be admitted for purposes of corroboration is a matter in the sound discretion of the trial judge. *Beaty v. United States*, 203 F.2d 652 (4th Cir. 1953). Although we believe the district judge's view of corroborative evidence to be somewhat narrow,[1] we cannot say that he abused his discretion on this record. As noted, he allowed three witnesses to testify about a statement identical to the one excluded, but made at a later date. In this context, if error occurred it was not so prejudicial as to justify direction of a new trial. See 6 WIGMORE, EVIDENCE § 1907 (3rd ed. 1940).

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[1] The district judge apparently thought it was improper to admit a statement in corroboration unless the witness being corroborated had previously testified to exactly the same thing. Yet we are actually dealing with a prior consistent statement designed to corroborate Dr. DeVore's entire story. Therefore, the evidence was competent and should not have been excluded on the grounds that there had been no foundation laid for it during Dr. DVore's testimony. See 4 WIGMORE, EVIDENCE § 1128 (3rd ed. 1940). Nevertheless, the testimony could reasonably be excluded under another theory that it was cumulative of the evidence given by two other witnesses about an identical statement.

III.

DeVore next contends that a recording of his conversation with the investigating agent should have been excluded on the authority of *Katz v. United States*, 389 U.S. 347 (1968), since no warrant was obtained before the recording was made. We disagree.

In *Katz* the Supreme Court overturned a conviction for illegally transmitting wagering information. The conviction had been obtained on the basis of a telephone conversation intercepted and recorded by F.B.I. agents. The agents tapped the wires running to a telephone booth used by defendant to make his calls.

In *Hoffa v. United States*, 385 U.S. 293 (1966), a conviction for jury tampering based on the testimony of a government informer was upheld. The informer had gained admission to the defendant's hotel room by deception. While inside the room, he overheard conversations in which the jury tampering was plotted. The testimony of the informer was held properly admitted at Hoffa's trial.

In *Lopez v. United States*, 373 U.S. 427 (1963), the situation was similar to that in *Hoffa*, except that the government agent recorded one of his conversations with the defendant. Both the testimony of the agent and the recording were admitted at the defendant's trial for attempted bribery of an Internal Revenue Agent. The defendant was convicted, and his conviction was sustained by the Supreme Court.

In our opinion the rationale of *Hoffa* and *Lopez* has survived the decision in *Katz*. *Katz* was based on the proposition that the defendant had a constitutionally protected right to rely on the privacy of a phone booth in making his calls. The emphasis was placed on the defendant's reasonable expectation of privacy with respect to third persons not participating in the conversation, rather than the

failure of the government to obtain a wiretap warrant, although the decision was grounded on both points. The distinction between *Katz* on the one hand, and Hoffa, *Lopez* and our case on the other, is clear enough. When a defendant has a conversation with another person he relinquishes his right of privacy with respect to that person. He may constitutionally complain of breach of privacy by an eavesdropper, but not of a breach of trust by the person he chooses to trust, however unwisely. Since the participants in a conversation are privileged to tell what was said, it necessarily must follow that a recording of what was said may either be used to corroborate the revelation, or simply as a more accurate means of disclosure. Both the testimony of the disguised agent and the recording were properly admissible under the *Lopez* rationale.

We recognize that the above discussion conflicts with the decision in *United States v. White*, 405 F.2d 838 (7th Cir. 1969), *cert. granted*, 394 U.S. 957 (1969). In *White* government agents placed a transmitter on the person of an informer. Because of this transmitter, the agents were able to overhear conversations between White and the informer. With the informer's permission one agent also overheard conversations by listening over a telephone receiver, which the informer was also using to speak with White. At the trial the agents testified to the conversations they had heard, but the informer did not testify. Partly as a result of this testimony, White was convicted of narcotics violations.

The Seventh Circuit reversed White's convictions, despite the government's contention that the informer's consent to the eavesdropping took the case out of the *Katz* rationale. The court found "that the surreptitious placing of the kel-set on (the) informer . . . was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz*" 405 F.2d at 843. The court also

reasoned that "(a) realistic appraisal of the defendant's conduct (permitted) no other conclusion than that he justifiably expected his conversations to be private" 405 F.2d at 846. Thus, the court rejected the idea that a defendant waives his right to privacy merely by speaking to an informer. See 405 F.2d at 838.

The court distinguished *Lopez* on the grounds that the intercepted conversation in that case was introduced for the "limited purpose" of corroborating an informer's testimony. See 405 F.2d at 838. It is difficult to see why waiver of the defendant's right of privacy should turn on whether the government decides to use an agent's testimony in corroboration of an informer or by itself. In our view there is no valid distinction between the two situations, and *Lopez* should control both. Our conclusion is buttressed by decisions of other circuits supporting a view contrary to that in *White*. See *United States v. Kaufer*, 406 F.2d 550 (2nd Cir. 1969), *affirmed on other grounds*, 394 U.S. 450 (1969), *rehearing denied*, 395 U.S. 917 (1969); *Dancey v. United States*, 390 F.2d 370 (5th Cir. 1968); see also *Doty v. United States*, 3 Cr. L.R. 2220 (10th Cir. 1968), *opinion withdrawn*, *Epps v. United States*, ... F.2d ....., 6 Cr. L.R. 4143 (10th Cir. 1969), *cert. granted*, ... U.S. ....., 6 Cr. L.R. 4143 (1970).

IV.

In his final point of error appellant complains of the district court's refusal to reveal any part of the probation report to him or his counsel. We are asked to reconsider the validity of our decision in *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968), where we held that it was within the trial court's discretion whether to reveal commentary on reputation, honesty, and community reputation to a defendant, and urged to hold instead that due process requires full disclosure. The same issue is pre-

sented in *Waller v. Florida*, 213 So. 2d 623 (1969), *cert. granted*, ... U.S. ....., 23 L.Ed.2d 764 (1969), *argued*, 6 Cr.L.R. 4056 (1969). We do not reach this question because we accept the district judge's disclaimer of reliance on the contents of the probation report in sentencing.

The judgment of the district court will be

AFFIRMED.

WINTER, Circuit Judge, concurring:

I concur in the judgment of the court and in most of the majority's opinion. I disassociate myself, however, from the essay on the law of entrapment contained in Part I of the opinion and the extensive dicta with regard to issues neither raised nor argued. While I express no present disapproval of *Kadis v. United States*, 373 F.2d 370 (1 Cir. 1967), I see no necessity at this time for adopting all of its holdings or its articulation of the basis for decision. To me defendant's entrapment arguments are answered sufficiently by the citation of our previous decision in *Newman v. United States*, 299 F. 128 (4 Cir. 1924).

With regard to sentencing, I stress that my concurrence rests solely upon my acceptance of the district judge's statement that he did not rely upon the presentence report in sentencing. If he was not going to rely on it, I suggest that the better practice would have been for him not to read it, lest it have some effect on him of which he was not aware. If he was going to rely on it, my view is that he should then exhibit it to counsel. See my separate opinion in *Baker v. United States*, 388 F.2d 931 (4 Cir. 1968). See also *State v. Kunz*, ... N.J. ....., 38 U.S.L.W. 2402; *Waller v. Florida*, 213 So.2d 623, *cert. granted* June 23, 1969, 37 U.S.L.W. 3493.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1434

ROBERT N. DEVORE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1970. The petition for a writ of certiorari was filed on April 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly handled the defense of entrapment.

384-931-70

2. Whether the trial court was required to reveal the contents of the pre-sentence report.

3. Whether the introduction of a recording of a conversation between petitioner and a government undercover agent was proper.

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on four counts of selling and delivering depressant and stimulant drugs in violation of 21 U.S.C. (Supp. IV) 331(q)(2). On April 24, 1969, he was sentenced to four years imprisonment and fined $22,000. The court of appeals affirmed.

An agent for the Bureau of Narcotics and Dangerous Drugs testified that, in the latter part of September, 1967, and twice in August, 1968, the Bureau received information concerning the activities of petitioner (Tr. 101). In response to these reports, Agent Norman C. Shumard was assigned to investigate.

Shumard went to petitioner's office on September 26, 1968. Introducing himself as Norman Shaw, a truck driver, he asked petitioner for some "stay awakes" (slang for amphetamine tablets) to enable him to keep alert on a long trip he was making (Tr. 114). Petitioner, who did not conduct a physical examination of the agent or ask about his health, agreed to give the agent a few pills. He refused, however, to supply him with a large quantity, since he feared the government would check his records. Shumard said this was too bad because he could handle a large supply of the pills and was willing to pay up to $100 per

thousand (Tr. 114–115). At this point, according to Shumard, petitioner asked him how much he could purchase. He showed the agent a drug catalogue and told him he could supply the agent with 10,000 Dexedrine pills for $1,000. Shumard accepted the offer and left (Tr. 115). Petitioner ordered the drugs the next day (Tr. 290).

On October 10, 1968, petitioner told the agent that the shipment would not arrive before October 15. Shumard then placed an order for "sleepers" (barbiturates) (Tr. 116–117). On the evening of October 15th, Agent Shumard returned to petitioner's office. Petitioner did not have the barbiturates but gave the agent 10,000 Dexedrine pills in exchange for $850, the balance to be paid at their next meeting (Tr. 120-122).

On October 17, 1968, Shumard gave petitioner the remaining $150 and purchased unlabeled bottles of Nembutal tablets for $100. He also agreed to buy an additional 10,000 Dexedrine pills plus 2,000 Dexamyl and 2,000 Nembutal tablets (Tr. 124–128). In answer to petitioner's inquiry, Shumard told him he would purchase up to 25,000 pills.

On November 4, 1968, Shumard told petitioner that he could dispose of 200,000 pills (Tr. 132). Petitioner agreed to supply him with up to 45,000 pills per month at $75 per thousand. Four days later, petitioner delivered 14,000 tablets to the agent at a cost of $1,050 (Tr. 145). Shumard discovered that this shipment was short by approximately 2,000 pills and returned, on November 19, 1968, to discuss the shortage (Tr. 148). During this meeting the agent carried a concealed Kell radio-transmitter by means of which

the entire conversation was recorded. The tape was admitted at trial to corroborate Shumard's testimony.

The final delivery occurred on December 17, 1968, when Shumard went to petitioner's office and received 10,000 tablets of Dexedrine. After the transaction was concluded, petitioner was placed under arrest (Tr. 151).

According to petitioner's testimony, he refused to sell or give any drugs to Agent Shumard on his first visit, September 26, 1968. Later that evening, he telephoned the police about the incident and was told to obtain whatever information he could (Tr. 282–286). The next day, he ordered the drugs requested by the agent to set a trap for him (Tr. 290). He testified that his continued contact with the agent was solely for the purpose of helping the police (Tr. 297, 305, 318). Petitioner admitted that he never attempted to contact or otherwise inform the police after his initial phone call (Tr. 333), even when a deputy sheriff came to his office as a patient (Tr. 336–337).

The trial court submitted the issue of entrapment to the jury (Tr. 442) under instructions which are not questioned.

ARGUMENT

1. In the court of appeals, petitioner argued that, even though he raised the defense of entrapment, the government should not have been allowed to use hearsay testimony on the issue of predisposition to commit the offense. The majority opinion of the court below expressed the view that the evidence, which showed merely an offer to buy, did not even raise an

issue of entrapment, and that "the government need not have reasonable grounds to suspect illegal conduct before offering the opportunity to commit a crime" (Pet. App. 17). All three members of the panel agreed that on the facts, the jury could properly reject the defense of entrapment.

Much of the petition for a writ of certiorari relates to that part of the opinion below which suggests that the evidence did not even raise an issue for the jury. Since, here, the issue was in fact submitted to the jury, this would not be an appropriate case in which to resolve such subtle differences as exist among the circuits as to the degree of solicitation by the government which is sufficient to raise an issue for the jury to resolve.

Petitioner's contention that the trial court allowed improper evidence to come before the jury on the issue of entrapment is without merit. Agent Shumard testified that he was assigned to investigate petitioner because on one occasion in September 1967 and on two occasions in August 1968, the Bureau of Narcotics and Dangerous Drugs received reports concerning petitioner's activities (Tr. 101–102). The testimony was limited to the fact that information had been received, without revelation of either the source or the contents of the reports. The fact that these reports had been received merely furnished the background for the agent's testimony as to his dealings with petitioner. The government based its essential evidence refuting entrapment on petitioner's readiness to violate the law and the inconsistencies in his own testimony.

Petitioner also claims that the government deliberately permitted one of its witnesses to testify, inaccurately, that petitioner had previously been under criminal investigation. The witness, who was the custodian of records of the Interstate Drug Exchange, testified on direct concerning information sent to the Bureau of Narcotics after the date of the offense charged. On cross-examination he was asked if there had been other inquiries and if the records for 1967 and 1968 were available. He replied that they were but that he had been asked to check only for the period from September to December 1968 (Tr. 239–240). Defense counsel also asked whether Interstate had received a request from a company in Atlanta for an accounting of drugs sold by petitioner. The witness testified that the request did come in and was answered but that he himself was not connected with it (Tr. 244). There is nothing in the replies of the witness to imply that this investigation had dealt with the illegal sale of drugs. Furthermore, to the extent that the agent's testimony did indirectly suggest that there might have been prior investigation of illegal activity, the testimony was elicited at the instance of defense counsel.

2. Petitioner contends that the trial court erred in refusing to disclose information contained in his probation report. Under Rule 32(c)(2), F.R. Crim. P., the disclosure of any or all of the material in a presentence report rests within the discretion of the trial judge. See *United States* v. *Gross,* 416 F. 2d 1205 (C.A. 8); *United States* v. *Crutcher,* 405 F. 2d

239 (C.A. 2), certiorari denied, 394 U.S. 908. Since the trial judge announced, prior to sentencing, that he based sentence solely upon the evidence at trial and not on the information in the probation report (Tr. 35i), such refusal did not constitute an abuse of discretion.[1]

3. As noted in the statement on November 19, 1968, agent Shumard carried a Kell radio-transmitter, by means of which his conversation with petitioner was recorded. The tape was played to the jury during trial to corroborate Shumard. The admissibility of the use of a tape obtained by one party to a conversation was upheld in *Lopez* v. *United States,* 373 U.S. 427. In *White* v. *United States,* No. 46, this Term, restored to the calendar for reargument, this Court is considering the admissibility of evidence obtained through carrying of electronic equipment by one of the parties to a conversation. In *White,* the informant who carried the device was not available to testify, whereas here the tape merely corroborated the testimony of the witness. Nevertheless, the Court

[1] Petitioner believed that the case of *Waller* v. *Florida,* No. 24, this Term, which had not yet been decided at the time petitioner filed his brief, had a bearing on this issue. The decision rendered on April 6, 1970, does not deal with disclosure of pre-sentence reports.

may wish to defer action on this petition pending decision in *White*.

Respectfully submitted.

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